IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: D893/99

In the matter between:

COIN SECURITY GROUP (PTY) LIMITED	Applicant
and	
BENEDICT MSHENGU	First Respondent
J NGWENYA	Second Respondent
THE DIRECTOR OF THE COMMISSIONFOR CONCILIATION, MEDIATION AND ARBITRATION	Third Respondent

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JUDGEMENT

MASERUMULE AJ

1. The applicant seeks to review an award handed down by the second respondent ("the commissioner") on 12 July 1999, in terms of section 145

of the Labour Relations Act, 66 of 1995, as amended, ("the Act"). The attack upon the commissioner's award is based on the:

1.1 commissioner's refusal to postpone the arbitration proceedings on 7 July 1999;

1.2 commissioner's refusal to recuse himself prior to the arbitration hearing on 7 July 1999; and

1.3 fact that the commissioner also acted as an interpreter when the first respondent gave evidence during the arbitration proceedings;

1.4 fact that the amount of compensation awarded to the first respondent is in excess of the permissible maximum prescribed by section 194 (2) of the Act.

2. It is alleged on behalf of the applicant that all of the above conduct on the part of the commissioner amounts to gross irregularity in the conduct of the arbitration proceedings. I will deal with each of the ground separately.

Summary of the facts

3. The arbitration proceedings in this matter commenced on 10 February 1999. Mr. Burnett, the applicant's regional Manager for Kwa-Zulu Natal, represented the applicant. There was no interpreter available to interpret from Zulu to English and vice versa. Faced with the possibility of a postponement, the parties agreed that the commissioner should also act as interpreter for the parties. The arbitration proceedings were not

concluded and were adjourned to 7 April 1999.

4. On 7 April 1999, the applicant's representative was not present at 9h30 and the commissioner phoned Mr. Burnett's office and was informed that the former was on his way to the arbitration venue. Another phone call later established that Mr. Burnett would be arriving at the airport, presumably, Durban, at 11h00. By 11h30, Burnett had not yet arrived and the commissioner proceeded with the hearing in the absence of applicant' s representative. First respondent testified and closed his case. The commissioner reserved his award.

5. At approximately 13h00 of the same day, Burnett arrived at the venue where the arbitration proceedings were to take place. The commissioner informed him that the proceedings had been concluded in applicant's absence. Later that afternoon, Burnett sent a letter to the commissioner in which he requested a rehearing to enable applicant to lead evidence.

6. The commissioner decided to treat Burnett's request as an application for a rescission and the matter was set down accordingly for 26 May 1999. The application was indeed heard on that day and the commissioner handed down a ruling on 27 May 1999 in which he held that since he had not yet rendered an award, rescission was not the appropriate way to deal with the matter. Instead, he decided that the applicant would be allowed to lead evidence and he postponed the matter to 7 July 199 for that purpose.

7. In the course of his ruling of 27 May 1999, the commissioner made the following observations, which are relevant in understanding what transpired later. The contentious paragraph reads as follows:

"**In his address Mr. Bax, did not have any supporting affidavit by Mr. Bennet nor from any staff member from Richards bay branch as to why respondent did not turn up on time on the 7th April 1999. He referred me to his conversation with his Richards Bay office, as well as Mr. Bennet. None of this could take this matter further. He sometimes lost his cool when asked by me to give cogent reasons showing good cause for any rescission. He also appeared to be out of his depth about the requirements set out in the Act. His attitude and conduct bordered on contempt, while he did not make any case for rescission."**

8. It is the passage quoted above that triggered off a series of letters from the applicant in which it sought the recusal of the commissioner.

The refusal to postpone the arbitration proceedings on 7 July 1999

9. On 1 June 1999, Mr. Bax, the applicant's Human Resources Director, wrote a letter to the commissioner in which he took issue with the observations made by the commissioner in his ruling of 27 May 1999 regarding his conduct on 26 May 1999 and his implied ignorance of the Act. The applicant stated in this letter that the commissioner should recuse himself from the matter because his remarks, together with the fact that he had earlier acted as an interpreter during the first day of the proceedings, indicated bias against the applicant. This letter was followed by another on 14 June and a further one addressed to the Director of the CCMA on 24 June 1999. Neither the commissioner nor the Director of the CCMA responded to these letters.
10. On 5 July 1999, two days before the arbitration resumed, Bax was served with a subpoena to appear at another arbitration hearing in Cape Town to which the applicant was a party, on 7 July 1999. Bax states that

applicant's attorney advised him that he would be in contempt of the CCMA if he ignored the subpoena.

11. It is unclear why Bax, who is an employee of the applicant, which was a party to the arbitration proceedings to be held in Cape Town, had to be subpoenaed. There is also no explanation as to why the subpoena was issued on such short notice. There is also no explanation why the attorney representing the applicant in the Cape Town matter seems to have informed Bax that he was required to be a witness only two days before the hearing.

12. On 7 July 1999, a M Du Plessis, an employee of the applicant, appeared at the arbitration before the second respondent and handed in an affidavit in which the applicant sought a postponement of the arbitration proceedings on the basis that Bax was not available, having gone to Cape Town to attend the other hearing and that there was no other qualified person to handle the arbitration before the second respondent. The application for a postponement was opposed by the first respondent and the second respondent dismissed the application.

13. The arbitration proceeding were concluded without the applicant having led any evidence and the commissioner issued the award which is the subject matter of this review application. His award is therefore, primarily based on the evidence of the first respondent.

14. In his award, the commissioner gave as reasons for refusing to postpone the arbitration proceedings the fact that:

14.1 he could see no reason why the other matter in Cape Town had to take

precedence over that involving the first respondent;

14.2 the applicant had not even been prepared to continue with the matter if a postponement was refused, as Du Plessis had not bought any witnesses to the hearing.

15. The applicant submitted, quite correctly, that the commissioner had a discretion to postpone the arbitration on 7 July 1999, and that such discretion must be exercised judicially. The applicant submits that there would have been no prejudice to the first respondent had a postponement been granted, that it does not appear that the commissioner considered this issue and that a costs order would have been the appropriate way to deal with any potential prejudice. For these reasons, the applicant submits that the commissioner committed a gross irregularity in the conduct of the proceedings.

16. I do not agree with the applicant's submission. The commissioner has provided reasons for refusing a postponement. He took a particular view of the matter and decided that the fact that Bax had been subpoenaed to appear in Cape Town in itself did not justify a postponement. I fail to see how this can be said to constitute an irregularity. It seems to me that Bax, having decided that the Cape Town matter was more important than the one involving the applicant, took a real risk that the arbitration hearing involving the first respondent may continue in his absence, to the detriment of the applicant.

17. There is no explanation in applicant's papers as to why he had to be subpoenaed, as he is an employee of the applicant, a party to the arbitration in Cape Town. He does not explain why he did not inform his

attorney and the CCMA in Cape Town that he was involved in another matter, the date for which had been conveyed to him by way of the ruling of 27 May 1999. In fact, it does not appear from the papers that he made any attempt to communicate with the CCMA in Cape Town to explain that the subpoena had been served on too short a notice to enable him to comply therewith.

18. The submission that there would be no prejudice to the first respondent is without merit. The compensation payable in terms of section 194 (2) of the Act is limited to twelve months' pay. The applicant does not say that it tendered to pay additional compensation in the event that the conclusion of the arbitration would be delayed to beyond twelve months as a result of the postponement that it sought. The first respondent has a material interest in having the matter finalised. He had been dismissed in March 1998. In July 1999 the mater had not yet been finalised and the applicant was seeking a postponement.

19. It also noteworthy that the applicant had not made any arrangement to continue with the arbitration in the event that a postponement was refused. Implicit in this is the assumption by the applicant that it was as of right entitled to a postponement and that it arranged its affairs on the basis of the correctness of that assumption. The applicant was not entitled to assume that a postponement would be granted and only has itself to blame for its failure to make appropriate arrangements for the continuation of the arbitration on the scheduled date.

20. I cannot find, having regard to all the facts, that the commissioner committed an irregularity in refusing a postponement. This ground of review must fail.

The commissioner's refusal to recuse himself

21. The applicant relies on the letters of 1, 14 and 24 July 1999 for its assertion that the commissioner should have recused himself or at least considered the "application" for recusal and refer to it in his award. By not making a ruling on the matter, so the applicant submits, the commissioner committed a serious irregularity in the conduct of the proceedings.

22. It needs to be said that in fact and in truth, there never was a proper application for the commissioner's recusal. Not one of the letters that the applicant relies upon as constituting an application for the commissioner's recusal were copied to the first respondent or his attorney. In fact, the first respondent was not aware of such an application. The first respondent had a real and material interest in such an application and the commissioner would only have been obliged to consider an application of that nature if it had been properly made.

23. I also believe that such an application would have had to be argued before the commissioner on the day scheduled for the arbitration hearing, with the first respondent being given an opportunity to respond thereto. This did not happen, as the applicant did not take part in the arbitration proceedings on 7 July 1999. Interestingly enough, du Plessis only asked for a postponement, and not for the recusal of the commissioner.

24. In addition, the accusations of bias against the commissioner and the request for his recusal seem to be based on the contents of the ruling

made by the commissioner on 27 May 1999 and the fact that the commissioner had also acted as a interpreter for the parties at the first hearing on 10 February 1999 and 26 May 1999.

25. I can find nothing in the ruling that would give rise to a reasonable apprehension of bias on the part of a reasonable litigant. It seems to me that it is the criticism by the commissioner of Bax and how he dealt with the issues during the hearing on 26 May 1999 that gave rise to the request for the commissioner's recusal. Such criticism as the commissioner made is the kind of criticism that those appearing before a tribunal can expect. Bax's sensitivity to being criticized does not constitute a sufficient ground to found a reasonable apprehension of bias. The fact that the commissioner decided in applicant's favour to let it lead evidence on 7 July 1999 militates against any suggestion of bias against the applicant. It follows that the ground for review based on the commissioner's alleged bias and refusal to recuse himself must fail.

The commissioner's role as interpreter

26. In his letter to the Director of the CCMA dated 24 June 1999, Bax stated that the commissioner "**took it upon himself to do all translation into English**". In its founding affidavit, the applicant, again through Bax, allege this time under oath, that applicant's representative at that hearing, Mr. Burnett, "**raised his concerns with Second Respondent because of Second Respondent doing the translation in the matter**." In his answering affidavit, the first respondent states that he required an interpreter to interpret from English to Zulu and vice versa, that the commissioner informed the parties that no interpreters were available and by agreement with the applicant, the commissioner interpreted the proceedings.

27. In its replying affidavit, the applicant now concedes that Burnett, its representative at that hearing, agreed to the commissioner acting as an interpreter as the matter would otherwise have been postponed due to the absence of an interpreter. The applicant then alleges that although Burnett agreed to the arrangement, he had raised his concerns about the commissioner's role as an interpreter.

28. I prefer first respondent's version that there was agreement that the commissioner should act as an interpreter and that the applicant did not raise any alleged concerns in this regard. The applicant has not been entirely honest in this regard. Bax's assertion in his letter to the Director of the CCMA that the commissioner took it upon himself to act as an interpreter is clearly false, as appears from the reluctant concession in the replying affidavit. In addition, Burnett kept his own notes of the proceedings on 10 February 1999. Nowhere in the notes does he record or refer to any concerns about the commissioner acting as an interpreter. In fact, that the commissioner acted as an interpreter is not even recorded in his notes.

29. It is important to observe that the applicant does not allege that the commissioner misinterpreted what was said during the hearing or that there is reason to believe that he did not interpret properly.

30. In my view, where the parties agree that an arbitrating commissioner should also act as an interpreter, it is not open to one of the parties to

subsequently raise the commissioner's role as an interpreter as a ground for review following the conclusion of the arbitration hearing. Arbitration proceedings before the CCMA are informal and are not governed by strict formalities. In the present matter, it is clear that the parties wished to expedite the finalisation of the dispute, which would have been delayed by a postponement occasioned by the absence of an interpreter. They clearly appreciated what they were doing at the time and had a commendable reason for their arrangement. It is undesirable that the losing party should seek to overturn an award by twisting facts to support its case.

31. I pause to add that my conclusions are based on the particular facts of this case and should not be read to mean that I encourage the kind of arrangement arrived at by the parties and the commissioner. There should, in as far as is possible, be a clear distinction and separation between the role of the commissioner, on the one hand, and other role players in arbitration proceedings such as the parties' representatives, the case management officers and the interpreters.

32. However where, as in the present matter, the role players agree on a particular course of action that will expedite the proceedings, unless such an arrangement is particularly objectionable and repugnant to ones' sense of justice and fairness, parties should not be allowed to use their own agreements to found grounds for the review of what is otherwise a justifiable award.

33. It follows that the fact that the review of the commissioner's award on the two grounds dealt with above must fail.

Legal representation afforded to the first respondent on 7 July 1999

34. The applicant has not in its papers raised legal representation as a ground for review. It raises this complaint in its heads of argument, without as much as by the leave of the court. For the sake of completeness, however, I deal with this complaint below.

35. At the hearing on 7 July 1999, and after the applicant had applied for a postponement, the commissioner allowed the first respondent's attorney, who had been attending the proceedings as an observer, to make representations on behalf of the first respondent, opposing such an application. The commissioner has also recorded in his notes that after the postponement was refused, he informed the commissioner that the first respondent had already closed his case and now sought an award based on the available evidence.

36. It can hardly be said that this amounts to a gross irregularity. The first respondent's attorney addressed the commissioner with regards to an application for a postponement, and not during the arbitration proceedings themselves.

37. Even if allowing third respondent's attorney to oppose the application for a postponement were to be elevated to representing him in the arbitration proceedings, the nature of the issue dealt with is such that it does not amount to a "gross" irregularity in the proceedings. It would be a minor irregularity that would not warrant a review of the commissioner's award simply because he allowed legal representation during argument on an application for a postponement. This ground of

review, even if it were to be allowed to be raised at this stage, has no merit and must fail.

Compensation awarded to first respondent

38. The commissioner awarded the first respondent compensation amounting to fourteen months and two week's salary. The commissioner reasoned that because the first respondent's dismissal was both substantively and procedurally unfair, he was entitled to compensation equals to what he would have earned from the date of his dismissal to the last date of the hearing. The commissioner purported to be acting in terms of section 194 (1) and (2) of the Act, and refers to **Johnson and Johnson v CWIU** (1999) 20 ILJ 89 (LAC) as authority for awarding compensation exceeding twelve months' salary.

39. The commissioner clearly exceeded his powers in awarding compensation exceeding twelve months' pay, it being common cause that the first respondent was dismissed for alleged misconduct. Compensation for substantive and procedural unfairness in respect of a dismissal for misconduct is limited to the equivalent of a maximum of twelve months' pay. In addition, the commissioner also exceeded his powers in awarding notice pay, since such payment does not fall within the ambit of the remedies available to an employee whose dismissal is arbitrated by the CCMA.

40. The applicant submitted that should this be the only successful ground of review, I should review and set aside the award in so far as it awards excessive compensation, and substitute it with an award for payment of twelve months' compensation. I believe this to be the appropriate

approach to adopt. No useful purpose will be served by referring the matter back to the CCMA, particularly because the first respondent's monthly earnings are set out in the award and it is matter of simple mathematical calculation to determine the correct amount of compensation payable.

41. As regards costs, although the applicant has succeeded in having a portion of the award set aside on one ground, all other grounds raised in the review application have failed. The variation of paragraph two of the award has not affected the substance of the award to any major degree. The first respondent has had to oppose the review application on all fronts and there is really no difference with regard to costs incurred by either party arising out of the setting aside and substitution of paragraph 2 of the commissioner's award. To that extend, the applicant has been unsuccessful in its application. Considering the requirements of the law and fairness, there seems to be no reason why the applicant should not be ordered to pay costs.

42. In the result, the orders that I make are as follows:

42.1 Paragraph 2 of the arbitration award made by the second respondent, dated 12 July 1999, is hereby reviewed and set aside and is substituted with the following:

"The respondent is ordered to pay the applicant an amount of R23 448-00 (Twenty Three Thousand, Four Hundred and Forty Eight Rands)."

42.2 The amount in paragraph 43.1 hereof is payable within seven days of the date of this judgment and bears interests at the prescribed rate of

interest referred to in section 143(2) of the Act, from 12 July 1999 to date of payment;

42.3 The applicant is ordered to pay the costs of this application.

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MASERUMULE AJ

DATE OF HEARING: 1 SEPTEMBER 2000

DATE OF JUDGEMENT: 08 JANUARY 2001

: ATTORNEY G VAN DER WESTHUIZEN OF MACROBERT DE VILLIERS LUNNON & TINDALL INC.

FOR FIRST RESPONDENT: ATTORNEY S CHELIN OF VAN ONSELEN O' CONNELL